United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1114

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To be argued by
JAY GOLDBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1114

UNITED STATES OF AMERICA,

Appellee,

—v.—

DONALD PAYDEN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT DONALD PAYDEN

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UNITED STATES OF AMERICA,

- against -

DONALD PAYDEN,

Defendant-Appellant.

INTRODUCTION

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Lee P. Gagliardi, Judge, on March 1st, 1976, after a jury convicted appellant Donald Payden (and a co-defendant Billy Vernon) of conspiracy to distribute cocaine and one count of possession of cocaine with intent to distribute.

Appellant was convicted of the Conspiracy Count, acquitted of Count 2, possession with intent to distribute on August 6th, 1974 and convicted of Count 3, possession with intent to distribute on August 27th, 1974.

Count 4, charging Vernon alone, a clearly misjoined count, resulted in Vernon's conviction of possession

of cocaine with intent to distribute.

Appellant, Payden was sentenced to a term of six years imprisonment on each of two counts to run concurrently. He was admitted to bail pending appeal by the District Court.

THE FACTS

A) The Indictment and Pre-Trial Proceedings

Appellant Donald Payden was accused of crimes committed on August 6th and August 23rd, 1974. He was indicted on April 28th, 1975. He was arrested on October 21st, 1975 - some fourteen months after the alleged offenses. No explanation was given for the pre arrest delay except that in response to a pre-trial motion to dismiss on the ground that such delay had deprived appellant of his fifth amendment rights, the government on November 3rd, 1975 stated that it first began looking for appellant in June 1975. Were this so, it still left unexplained the delay between August, 1974 to June, 1975, or a period of ten months. Even the claim that appellant could not be found between June 1975 and the date of his arrest on October 21st, 1975 is open to serious question since as the court noted on the date of sentence he was well and favorably

known in the community, many leaders had written on his behalf and by reason of his strong ties to the community he was continued on bail pending appeal. The matter of pre-arrest delay will be treated in Point Four, infra

As originally drawn, the indictment had a broad conspiracy count naming as defendants appellant and the following persons: Billy Vernon, David Bell, Lester Bell and Jackie Smith. Counts Two and Three related to conduct between appellant and co-defendant Vernon. Counts Four and Five to conduct between Lester Bell and Jackie Smith. Count Six - this important to our later discussion - to conduct between David and Lester Bell and Vernon. Count Seven to conduct by David Bell. By reason of the broad conspiracy count naming all, a misjoinder motion under Rule 8(b) would not have been successful (U.S. v. Miley, 513 F.2d 1191 at 1209 (2d Cir. 1975)) Accordingly, no such motion was made insofar as counts in which appellant was not named, i.e. four through seven. (* A 4 - 9)

On the very day of trial, the government moved "to sever the indictment" by removing from the indictment all reference to Lester and David Bell and Jackie Smith. The government's position was stated as follows:

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*References are to pages of the Appendix.

"Counts 4, 5 and 7 charge only the Bells and Jackie Smith and are severed for that reason. Count 6 charges the Bells and Billy Vernon but the Government does not contend that that possession of cocaine is part of the series of transactions between Billy Vernon and Donald Payden charged in the first three counts. The Government seeks to try the case against Donald Payden and Billy Vernon and therefor, under the requirements of Fed. R.Crim.P 8(b), seeks to sever Count 6 of the present indictment" (Government's moving memorandum of law).

What the government was doing was commendable* - it conceded that appellant had nothing to do with the Bells or Smith or in the dealings Vernon had with them. On November 13th, the day of trial, in oral argument the government reaffirmed that it did not contend that it was one conspiracy of which appellant was a part and his involvement was limited to an alleged illicit arrangement solely with Vernon (87 - 88). The Court permitted the indictment to be severed and redacted and a new document was presented which now supposedly met the requirements

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*Of course it was not done out of largesse. It was to avoid the problem of multiple conspiracies being charged in one count - a matter often criticized. See cases cited in Miley, supra.

of Rule 8(b). (32 - 34) As newly drawn, though well intended, it was nonetheless deficient. Former Count Six which related to conduct solely between Vernon and Lester and David Bell - and as earlier conceded had nothing whatever to do with appellant - was renumbered and became Count Four of the redacted indictment with the only difference the ommission of the Bells as named defendants. The government erroneously believed that 8(b) was satisfied by merely excising the names of the Bells, but otherwise the incident of October 3, 1974 could be charged as against Vernon alone and proof adduced at trial in furtherance of that count without misjoinder problems as to appellant. This of course was not so for it was unrelated to appellant and not a part of the overall conspiracy count now charged in Count One, this by the government's own concession. As will be treated below in Point Two there was in addition, prejudicial spillover onto appellant's case by inclusion of new Count Four (which in essence was Count Six in the original indictment) (compare 8 - 9 with 34).

No defense pre-trial motion to sever for misjoinder was made. As earlier noted, the original indictment with

its broad conspiracy count facially insulated then Count Six from such attack. The conspiracy count was thereafter redrawn when the government frankly acknowledged that it did not properly in the original indictment limit itself to the one conspiracy in which appellant was a part. It was only when the redacted indictment was presented on the very day of trial did facial misjoinder as to Count Four become apparent. But as will be seen below in Point One, the rush to trial should excuse counsel's oversight. He had only given ten days for motions as to the original indictment - which as earlier noted was not facially deficient - and no time, despite his requests, on the day the redacted indictment was submitted to give thought to its propriety. The trial promptly began right after the newly drawn indictment was accepted. The government acknowledged on the day of trial that there had been "very hurried circumstances" even in the consideration of counsel's original motions. (86 - 87) The appellant had been arrested on October 21st, 1975, after fourteen months unexplained pre arrest delay and ordered to trial November 13, 1975, despite counsel's earnest pleas that he could not render effective assistance or adequately prepare with

such short notice by reason of his trial schedule in other matters. Even though faced with what amounted to a new indictment, presenting new problems on the day of trial, he could not secure added time despite his requests therefore. (28 - 31, 70 - 72, 85)*

B) The Trial

On August 6, 1974 a confidential informant introduced an undercover police officer, Chris Jackson, to the co-defendant Billy Vernon. The officer said that he was interested in buying cocaine. He stated he "had a lot of money (and was) a cocaine dealer" (225). As Vernon and Officer Jackson drove "uptown" looking for what Vernon said was his connection, they happened upon the appellant (110). The officer asked if Vernon would inquire whether appellant had cocaine for sale. Vernon stopped the car, alighted therefrom and engaged Payden and others in a group (194, 201, 205) in conversation in front of a gambling club. He then returned to the car and told the officer that appellant did not have any drugs, but "his man had" and the price was $800.00 an ounce. The officer sitting in the car gave Vernon $800.00, who thereupon left the car, entered the club alone and came out with two packages of cocaine (112).

*Appellate counsel was not trial counsel. Substitution was by order of the District Judge, post sentence, but prior to the motion in the Court below for bail pending appeal.

Appellant was acquitted on this, Count 2.

On August 27, 1974 Vernon asked the officer whether he wanted to buy drugs from "his Cuban connection" and the officer agreed(115). When this attempt failed, they proceeded to the gambling club and saw appellant in front of the club. Vernon left the car and spoke to appellant (116). Vernon then told the officer to join him in the club. In the club, the officer saw fifteen people gambling. (117) Vernon said that appellant, who was in the club, did not want to deal until it got darker.

After a time, Vernon and the officer left the club. Appellant then left the club and spoke to Vernon. Vernon returned to the officer and said appellant was going to get the cocaine, but he wanted $400.00 front money. The officer saw Vernon and appellant enter a car and drive away. An hour and 15 minutes later Vernon alone met the officer at a bar downtown and gave the officer a package of cocaine. (120)

The following now relates to Count 4, a patently misjoined Count, charging only Vernon. On October 3, 1974 Vernon and the officer went to a bar and met one Lester Bell. Vernon said that Lester and his brother David Bell were interested in selling cocaine and after a conversation between Lester and Vernon the officer was told that the two Bell brothers would

be at Vernon's house at a given time with a supply of drugs to sell. Thereafter, the officer and Vernon went to Vernon's apartment. The Bell brothers arrived shortly thereafter. They brought with them 55.5 grams of cocaine which the officer "purchased". (124 - 6) Concededly none of this involved appellant. The narcotics were offered in evidence solely as to Vernon. (428 - 9)

On October 23, 1974, the officer told Vernon he wanted to deal directly with appellant. Vernon said that was not possible.(129-30) The officer did not see appellant on October 23, 1974. (239).

By way of summary, the officer conceded he never saw appellant with any money or with any drugs (240), and that the only information he had involving appellant in drugs was from Vernon. (207) There was nothing the officer heard appellant say which he understood to refer to narcotics (207). On August 27th, when the officer was able to enter the gambling club, he conceded that he did not overhear anything said by appellant (224) and admitted that he never at any time heard any conversation to which appellant was a party. (224-5). The Court emphasized this at 225

And, it was clear that during Vernon's absence of over an hour and a half before he alone returned with drugs the officer did not know where he had been or with whom. (234,237-8). From what Vernon told the officer he had "lots" of suppliers. (583)

The prosecutor in summation utilized the circumstances of misjoined count four to boost improperly the credibility of Vernon as it related to appellant. This was done by undercutting the appellant's argument that Vernon would not likely advise a big time wealthy drug dealer (the role the officer portrayed) who his true connection was, and thus his identification of appellant was unreliable. The prosecutor accomplished this by vigorous reference to the whole ell incident and the fact that this showed Vernon was the type who did not hesitate to expose his connections. (537-8) The misjoinder of count four resulted in prejudicial spillover onto appellant's case.

There was as previously noted, an obvious reason why the claim of misjoinder as to the October 3, 1974 incident could not have been raised pre trial. The original indictment named in one broad conspiracy count five defendants, including the Bell brothers and thus, as originally drawn,

it was not susceptible to a misjoinder motion (count 4 as finally numbered in the redacted indictment was in essence count 6 of the indictment as originally drawn).

The combined fact of undue prejudice, and the circumstances as set forth in Point One, which explain counsel's error in not alerting the court to the misjoinder, warrant the error being noticed in this Court.

C) Post Trial Motion. (668 - 670)

Upon conviction, the court permitted trial counsel to move under Rule 29 on the day of sentence. Trial counsel on the day of sentence advised the court of the misjoinder of Count Four. The Court entertained the motion but it was denied on two clearly erroneous grounds: (1) The Court held that the misjoinder motion should have been made within the first ten days following arraignment (2) there was no prejudice to appellant in any event. The Court did not accept the government's argument as to waiver (670).

Of course as will be shown below, and as earlier stated, the indictment on which appellant was arraigned was insulated by a broad multi-defendant conspiracy count from a motion addressed to facial misjoinder of then Count Six. Only after the expiration of the ten days and as late as

the very day of trial and upon the government's concession that appellant was not a part of the broad conspiracy count as originally drawn, but rather only a member of the narrow one as newly drawn, did misjoinder first become apparent. Secondly, the prejudicial spillover onto appellant's case from proof of the events of October 3rd involving Vernon and the Bells and the prosecutor's use of it in summation to reinforce his cause against appellant made prejudice obvious.

POINT ONE

THE DENIAL OF A REASONABLE CONTINUANCE TO PREPARE FOR TRIAL DEPRIVED APPELLANT OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS

It needs no citation of cases that appellant was entitled to fundamental fairness and the right to have his trial counsel adequately prepared for trial to render effective assistance. Joinder of Count 4 was violative of Rule 8(b) and decidedly prejudicial.

In what government counsel acknowledged was a "hurried" atmosphere, both counsel inadequately dealt with the danger of misjoinder.

Trial counsel could not have raised misjoinder in his October pre-trial motions since the indictment as originally drawn was insulated against such attack.

Failure to move pre-trial normally constitutes a waiver under Rule 12(b) 2, unless as Point Two, infra shows, prejudice and compelling circumstances excuse the waiver. Here, counsel had just three hours (the time the severance or redaction was granted) to consider that as then drawn the redacted indictment, i.e. count 4 presented a patent case of misjoinder.

In this point, we deal with extenuating circumstances

which serve to explain counsel's full consideration of the legal aspects of the case excuse, we submit, the failure to timely make appropriate pre-trial motions and generally demonstrate an abuse of discretion in denying trial counsel's requests for adequate time to prepare.

The events in which appellant was alleged to have been involved occurred in August of 1974. As the many letters which were sent to the Trial Court on his behalf prior to sentence demonstrate, he was well and favorably known in the community, and had constant stable roots therein. (677). The Government waited fourteen (14) months to arrest him. The reason for a delay of at least ten months* was unexplained. His arrest took place on October 21st, 1975, some fourteen months after the alleged crimes. Counsel appeared on October 22nd and was told the trial would commence six days later. Despite pleas for a continuance by reason of trial counsel's active engagement in other cases and his involvement in the preparation for trial of a case to be tried before a Judge of this Court, he was ordered to trial November 13th. Detailed reasons for needed

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*At a Pre-trial session on November 3, 1975 the Government claimed that they started looking for Payden June 3, 1975. Still, this leaves unexplained 10 months, i.e. August '74 to June '75. (45)

delay to prepare were specifically spelled out. They were sufficient and compelling, particularly in light of the government's unexplained pre arrest delay. (28-31, 70-72, 85) Pressure obviously contributed to the failure by anyone to spot the misjoinder issue as to count four.

As this Court noted in Gavino v. MacMahon, 499 F.2d 1191:

> It is true that the prompt disposition of criminal cases has been a matter of continuing concern to the Circuit . . .
>
> * * * * *
>
> As we said in promulgating the Rules, however, they were intended to promote disposition of criminal charges with "reasonable dispatch," uninhibited by delays "for which there is no good reason". They were never designed to permit a district court to ride roughshod over the right of a defendant to prepare for trial. Indeed they were aimed principally at prosecutorial delay.
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> Without minimizing the importance of the public interest in prompt disposition of criminal cases, we cannot allow our concern with calendar dispatch to triumph over a defendant's right to a fair trial, which is the foundation of our system of justice. To sacrifice a fair trial to the interest of expedition would surely undermine the true administration of justice.

Citing, pointedly - Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973).

Not one single fact justified the rush to judgment. The co-defendant was in jail on an unrelated case. And, it appears he was a cooperating witness in other matters. (48, 670) It is simply offensive and indefensible that the government can sit on its hands for at least 10 months, move when it is prepared without any explanation for a good portion of the pre-arrest delay and then a defendant, though in need of adequately prepared counsel, must be pushed to trial despite counsel's good faith plea that time is needed to adequately prepare.* The expedition in the trial of this case was at the expense of the appellant's constitutional right of fundamental fairness implicit in due process and cannot be discounted as an explanation for counsel's error in not raising the critical misjoinder point which is discussed below. As earlier noted, realistically it was not until the Court ordered a redacted indictment, just several hours before trial that misjoinder became a

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*This Court noted in Brathwaite v. Manson, 527 F2d 363,372 that a two month pre-arrest delay without explanation was both "long and . . . troubling" A fortiori is "troubling" unexplained delay of at least 10 months followed by undue haste in pushing to trial a defendant whose counsel in good faith asserts he is unprepared.

problem that warranted a pre-trial motion. Requests by counsel for delay were denied. (85)

POINT TWO

THE MISJOINDER OF COUNT FOUR WAS HIGHLY PREJUDICIAL AND SHOULD BE NOTICED BY THIS COURT

There was no misjoinder apparent from the face of the indictment as originally drawn. The broad multi-defendant conspiracy count insulated than Count 6 from any misjoinder motion. See in particular: U.S. v. Miley, supra at 1209.

The day of trial the government was permitted to "redact" the indictment, limit the conspiracy to just Vernon and appellant, take substantive count 6 of the original indictment, renumber it as count 4 and offer to prove the event solely as against Vernon. The Government had conceded that appellant had nothing to do with the event of October 3, 1974 and that the only conspiracy he was a part of was one that involved himself and Vernon with no other co-conspirators. Limiting the conspiracy count was therefore not a gratuitous act of the prosecutor; rather, it was designed to avoid the problem of multiple conspiracies. See Miley, supra.

Only from the fact of the redacted indictment on which appellant was ordered to trial - presented the day of trial - did the misjoinder of Count 4 first become apparent. As earlier pressed, the undue haste in pushing this case to trial simply cannot be ignored as a likely cause of counsels' (defense and prosecution) oversight in permitting

the fourth count to be a part of this trial. It was clearly misjoined under Rule 8(b). Miley, supra at p. 1209. The failure to make an appropriate pre-trial motion normally works a waiver under Rule 12 (b) 2. Rule 52 (b) should be applied in light of the unwarranted prejudice and unusual circumstances of this case. Professor Wright has written:

> The objection is waiver if not raised by motion before trial though in unusual circumstances the court may consider the objection though it is not made until some later time.
>
> Federal Practice and Procedure, Section 145 at pp. 337-338.

Relief from a waiver of the objection was accorded in U.S. v. Gougis, 374 F.2d 758 (7th Cir. 1967). In the case of Cupo v. U.S., 359 F.2d 990 (D.C. Cir. 1966), the court had before it a claim of misjoinder as to several defendants for whom no pre-trial motion had been made. In that case. unlike the case at bar, there was no serious prejudice

from the misjoinder. The Court noted however:

> If any defendant had appeared to be seriously prejudiced by joinder, the District Court on its own motion might have granted relief from waiver and ordered a severance.

To the same effect is U.S. v. Daniels, 437 F.2d 656 at 661 (D.C. Cir. 1970) where the court stated that by not moving under Rule 12(b) a defendant waived his rights under Rule 8 unless he could show serious prejudice. In the case at bar, we have both serious prejudice and a compelling circumstance that ought to excuse counsel's oversight.

Repeatedly the court below denied motions to sever, albeit on grounds other than misjoinder. In his pretrial motion, counsel moved for a severance pursuant to Rule 14 on the ground that haste in moving this case to trial for the reason that the co-defendant was incarcerated (on an unrelated charge) deprived appellant of "effective assistance of counsel". Other severance motions were made during trial (168, 522). But if counsel missed the misjoinder patent in the joinder of Count 4, one can not ignore the continuing responsibility of the Trial Judge who must be "particularly sensitive to

the possibility of such prejudice". Schaffer v. U.S., 362 U.S. 511 at 516 (1960). All would have gained perhaps from more deliberation prior to trial, including a normal period for the making of motions after the redrawn indictment and a decent interval before trial to adequately prepare the case, for misjoinder here resulted in serious improper prejudice. Counsel can not be charged with oversight in not moving pre-trial for he had only three hours to consider misjoinder, viz, the original indictment was not facially defective; only the redacted one was.

The appellant was charged in Counts 1, 2* and 3 with being the alleged "connection" for the co-defendant Vernon. Vernon, it was clear however, had a number of sources - lots of suppliers - so the prosecutor argued. (583). The case against appellant was exceedingly thin, resting on the hearsay declarations of Vernon. The officer conceded that he never observed appellant with any money or drugs. (207, 224, 225, 240). The obvious defense argument to the hearsay declarations of Vernon - who could not be called and for which reason a severance was sought (168, 522) was that they were not reliable, since a drug seller would not likely expose his "connection" to a new found wealthy drug purchaser lest he be cut out of any future deal.

This of course did not escape the prosecutor, who in

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*He was acquitted of this Count.

his argument, presaged the defense position by calling to the jury's attention the fact that the circumstances relating to the misjoined fourth count (the Bell incident) showed that Vernon was not opposed to exposing his connections. The prosecutor also made use in argument of the fourth count to support the general reliability of Vernon, against which appellant's counsel had a right to argue without having to contend with the Bell incident. (537-8). While the defense might have countered that what Vernon may or may not have done with respect to Bell did not necessarily mean Vernon was willing to expose any other "connection", the point is the Bell incident had absolutely no proper place whatever in this trial, if Rule 8 had been understood by all.

This is not a case where, even if there had been a severance, proof of the Bell incident would have been proper in the case against appellant (c.f. U.S. v. Granello, 365 F2d 990 (2d Cir. 1966)). The offense charged in count four was in no proper way connected with the government's case against appellant. The result of proof on count four was to erroneously bring to the attention of the jury a distinct and independent transaction and permit the prosecutor improperly to argue that such an incident supported the govern-

ment's case against appellant. It was patent misjoinder and the misuse of it by the prosecutor which deprived appellant of a fair trial.

In this case, then there was plain prejudice. McElroy v. U.S., 164 U.S. 76, 80-81 (1896); Ward v. U.S., 289 F2d 877 (1961); Ingram v. U.S., 272 F2d 567 (4th Cir. 1959). As earlier noted, aside from substantial prejudice there were unusual circumstances both in the rush to trial and the inability to call Vernon to the stand to confront him with respect to the circumstances surrounding the alleged Bell incident.

For these reasons, this court ought to excuse the failure to timely move and consider the effect of undue prejudice by reason both of misjoinder and the prosecutor's misuse thereof upon appellant's right to a fair trial.

POINT THREE

THE NON HEARSAY EVIDENCE OF APPELLANT'S PARTICIPATION WAS INSUFFICIENT TO PERMIT THE ADMISSION AGAINST HIM OF THE HEARSAY STATEMENTS OF THE CO-DEFENDANT

This court held in United States v. Geaney, 417 F.2d 1116 (2 Cir. 1969), cert. denied, 397 U.S. 1028, (1970), that the trial judge must determine whether the defendant's participation in a conspiracy has been established by "a fair preponderance of the (independent non-hearsay) evidence" before hearsay statements made by an alleged co-conspirator may properly be considered against the defendant.

Mere association with an alleged conspirator, without more, is insufficient to establish the necessary foundation for the admissibility of incriminating statements. U.S. v. Cimino, 321 F.2d 509, 510 (2 Cir. 1963), cert. denied, 375 U.S. 974 (1964); U.S. v. Bentvena, 319 F.2d 916, 949 (2 Cir.), cert. denied sub nom, Mirra v. U.S., 375 U.S. 940 (1963); U.S. v. Stromberg, 268 F.2d 256, 267 (2 Cir.), cert. denied sub nom. Lessa v. U.S., 361 U.S. 863 (1959).

Appellant was acquitted of Count Two which charged that he participated in the August 6, 1974 sale. And so, what

would be claimed as independent evidence as it relates to that date is exceedingly tenuous as support for the Government's position. (But cf. U.S. v. Ragland, 375 F.2d 471 at 477 (2d Cir. 1967).

The undercover officer conceded that the only information he had allegedly involving appellant in drugs was from the co-defendant (207). Further, that he never heard any conversation to which appellant was a party (224-225) or any conversation or statement by appellant which he interpreted to refer to narcotics (207). He never saw appellant with money or with any drugs (240). Appellant was not present when Vernon and the officer spoke about narcotics. The reliability of what Vernon said was open to question for he admitted he had a lot of suppliers and with the officer portraying himself as a wealthy purchaser, there was little reason for Vernon to disclose his true connection.

The sole pieces of independent evidence were that the officer from a distance saw Vernon speak to appellant, but appellant was part of a larger group of people Vernon had approached, and then Vernon, after obtaining money went into a gambling club alone and returned to the officer with drugs. On another occasion, the officer entered a gambling club and

saw appellant along with fifteen other people playing cards. Eventually, Vernon and appellant left the club and after Vernon alone and not in appellant's presence obtained money from the officer he and appellant drove away. There was no proof that surveilling officers identified themselves so that the speed with which appellant drove does not constitute any circumstantial evidence as to flight or of guilt. Eventually, Vernon more than an hour later returned alone with drugs, but there was no one to say where he had been. (234, 237-238). We know from the misjoined count that the Bells were one of his connections and he had "lots of suppliers."

There was nothing said by appellant which the officer took to relate to narcotics and once again he conceded he overheard no conversation involving appellant (207, 224 - 5). So too, appellant was not a party to any conversation with the officer or shown to be in the presence of the officer when the officer and Vernon discussed narcotics.

We submit that there was insufficient independent evidence to permit the inference that appellant had associated himself with Vernon's continuing drug venture. In U.S. v. Wiley, 519 F.2d 1348 (2d Cir. 1975) there were drug discussions overheard by the witness which took place in the defendant's actual

presence, he participated in an overheard conversation which triggered a trip to procure the drugs "and was present when" the drugs were delivered to the witness. (c.f. U.S. v. Steward, 451 F.2d 1203 (2d Cir. 1971). In United States v Calabro, 449 F.2d 885 (2d Cir. 1971) the independent evidence which the court viewed as "of critical importance" was the frisking of the undercover agent either by "Calabro or by his colleague in Calabro's presence". This did not occur in the case at bar.

In U.S. v. Ragland, 375 F.2d 471 (2d Cir. 1967) the defendant was present when discussions relating to narcotics took place and the defendant was actually observed to obtain money and give to the co-defendant the envelopes which proved to contain narcotics. In the case at bar, no witness "overheard the conversation" between Vernon and appellant "or saw anything passed from one to the other". U.S. v. Cimino, 321 F.2d 509 at 510 (2d Cir. 1963). This is not a case where the appellant drove the car "in which negotiations took place and the transaction was consummated". Ragland, supra at 477. So too, there was no proof that he was present when narcotics were exhibited. c.f. U.S. v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972).

In U.S. v. Cirillo, 499 F.2d 872 (2d Cir. 1974) independent proof was found wanting where there was no showing that narcotics were ever discussed in defendant Garber's presence, citing as well with approval Glover v. U.S., 306 F.2d 594 (10th

Cir. 1962). Glover warrants full discussion in light of this Court's citation of it. There, on six occasions an undercover officer met the co-defendant Irvin and obtained narcotics from him. Each and every time defendant Glover was seen in the vicinity where the transactions took place. On two occasions Glover was with Irvin before and after the purchases and there were conversations between the two. As in the case at bar, there was testimony that nothing was seen to pass, money or drugs, between Irvin and Glover. Irvin had made incriminatory hearsay statements as to defendant Glover and the undercover officer even spoke with Glover asking if they could "do some business together". Glover was not adverse to the idea but simply had to wait until another person "got back". While the case on appeal was concerned with the issue of sufficiency to sustain the verdict, the Court ruled that there was insufficient independent evidence to warrant receipt of the hearsay proof of Irvin, hence its citation by this Court in Cirillo, supra at 886.

The threshold requirement as to the admissibility of the hearsay declarations in the case at bar was not met. Without such proof, there was no evidence of any kind to support the verdict.

POINT FOUR

THERE WAS UNJUSTIFIED PRE-ARREST DELAY THERE SHOULD BE A REMAND TO DETERMINE THE REASON FOR SUCH DELAY AND IF IT RESULTED FROM THE PROSECUTION'S EFFORT TO OBTAIN A TACTICAL ADVANTAGE

Counsel moved on October 31, 1975 to dismiss the indictment on due process grounds resulting from the pre-arrest delay (18 - 19). Amplifying this, he represented that with the short time available for pre trial investigation and preparation and with the unexplained pre arrest delay, the appellant was unable to "adequately defend himself against the charges, or to establish any alibi as of the date, time and place when it is alleged that the crime took place" (25). The Government offered absolutely no explanation for the delay between the period from at least August, 1974 to June, 1975 and the court required none (45). No heed was paid to the combined effect of the rush to trial and the unexplained long pre arrest delay and the result this would inevitably have on pre trial preparation. The defense raised the issue fully but to no avail. No hearing was held to require the Government to come forward with any explanation for the pre-arrest delay.

The last overt act in the indictment as originally drawn was October 3, 1974, more than a year before the arrest.

This combination of facts - unexplained delay and rush to trial without any compelling need - violated appellant's right of due process. United States v. Capaldo, 402 F. 2d 821, 823 (2nd Cir.), Cert. den. 394, U.S. 989 (1969); United States v. Simmons, 338 F.2d 804, 806 (2nd Cir.) Cert. den. 380 U.S. 983 (1965); United States v. Holiday, 319 F.2d 775, 776 (2nd Cir., 1963); United States v. Hammond, 360 F. 2d 688, 689 (2nd Cir., 1966); United States v. Dickerson, 347 F. 2d 783, 784 (2nd Cir., 1965); United States v. Rivera, 346 F. 2d 942, 943 (2nd Cir., 1965); c.f. Petition of Provoo, 17 F.R.D. 183 (D.C.D. Md.) Affd. Sub. Num. United States v. Provoo, 350 U.S. 857 (pre indictment delay negates notion of fair trial) and Ross v. United States, 349 F. 2d 210, 215 (D.C. Cir. 1965) (dismissal under supervisory powers of the Court of Appeals).

Indeed in United States v. Marion, 404 U.S. 307, 92 S.Ct 455 (1971), the Government conceded that "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown ... that the pre-indictment delay ... caused substantial prejudice to the appellants' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."

In Marion, supra, Justice Douglas quoted with approval the holding in Regina v. Robins, 1 Cox's c.c. 114 (1844), a holding which is particularly apt in the context of the instant case:

> "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

Judge Wright in his concurring opinion in Nickens v. United States, 323 F.2d 808, 813 (D.C. Cir., 1963). He there stated:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings of the day of the alleged crime. Memory grown dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

In Moore v. Arizona, 414 U.S. 25 (1973) the Court cautioned that mere absence of prejudice does not in itself end inquiry into the denial of the constitutional right to the comparable right to a speedy trial. The "balancing test" referred to by the Court in Barker v. Wingo, 407 U.S. 514, 530 (1972) should be utilized in pre-arrest cases as well. See U.S. v. Jones, 524 F.2d 834 (D.C. Cir. 1975).

The most recent pronouncement on the subject by this Court may be found in U.S. v. Finkelstein, 526 F.2d 517 (1975). There, the defendants in relying on U.S. v. Marion, 404 U.S. 307 (1971) argued, as we do, that an indictment is to be dismissed when either actual prejudice or intentional prosecutorial delay to obtain some tactical advantage appears. In Finkelstein, aside from there being no demonstration of prejudice the government had come forward with sufficient proof to justify the delay.

In the case at bar, no such showing was made. The prosecutor has a distinct tactical advantage in each and every case where a defendant is charged with an act on one or two days and notice to him of the importance of the dates is delayed for well over a year. It should not need extended argument to convince one that the possibility of recalling

one's activities or finding supporting witnesses grows dimmer as time passes until a point is reached where the task simply becomes impossible. A fourteen month unexplained delay is prima facie intentionally undertaken to secure a tactical advantage.

As earlier noted, this Court recently expressed concern with a mere two month delay. Brathwaite, supra. The record is absolutely silent on the matter of any justification for the delay.

In U.S. v. Jones, 524 F.2d 834 (DC Cir. 1975) a "'rough rule of thumb' has emerged that delays of less than four months require no detailed exploration of underlying reasons". There, no pre-trial motion had been made.

We press the D.C. Circuit rule in Robinson v. U.S., 459 F.2d 847 (1972) requiring "detailed judicial exploration of the underlying reasons" for delays of more than four months. A delay of more than a year caused the Eighth Circuit to feel it was required to engage in an "inquiry" into its causes. U.S. v. Green, 526 F.2d 212 at 214 (8th Cir. 1975).

Faced with the objective fact of delay, the matter of culpability if any, ought to be explored in an adversarial context. c.f. U.S. v. Hilton, 521 F.2d 164 (2d Cir. 1975)

It is time to put the government to its proof when there is raised a genuine issue as to government misconduct. Untested averments of reasons for delay or a prosecutor's declaration of his understanding of his obligations will simply no longer do, either in this context or others. See e.g. Hilton, supra; U.S. v. Deutsch, 373 F.S. 289 (SDNY, 1974)

A remand is in order.

POINT FIVE

THE FAILURE OF THE COURT BELOW TO HOLD AN IDENTIFICATION HEARING WAS ERRONEOUS

Though pressed for trial, counsel below in his motion papers moved for "an order suppressing improperly acquired identification evidence." (19) Counsel expressed concern whether the arresting officers had taken the proper person into custody. He moved for a hearing to determine the manner and means of the identification pointing out that:

> "I believe there can be no distinction drawn between a civilian and a police officer is so far as their abilities to be mistaken. As a matter of fact, police officers are routinely making observations than a civilian would be. As a result, they can become confused and often times are mistaken"

In the case at bar, Vernon identified his supplier as "Country". Aside from the in-court identification of the officer, there was no proof that appellant was known by that name. In disposing of the pre-trial request for a hearing to examine into the matter of identification, the Trial Court assumed that as long as no photo array had been used, there was no need to explore the circumstances under which identification had been made. The defense had advised the court

that due to the press of trial there was insufficient time to establish appellant's whereabouts on the days in question. He had no prior narcotics involvement, his contacts with the law being as the prosecutor stated "expired driver's license and some gambling arrests" (660). The letters handed up to the judge on sentence written by community leaders clearly present an individual at odds with a person who is a drug dealer. If appeliant were the perpetrator in fact,what accounted for the delay in arresting him or finding him though he had continuing and stable community roots? Counsel had a right to inquire into the circumstances of the in-court identification, outside the presence of the jury, in order to determine whether the prosecution had engaged in indefensible pre-trial identification procedures leading to the possibility of irreparable mistaken in-court identification. Improper photo spreads are not the only out of court techniques that may give rise to the possibility of mistaken in-court identification. The trilogy of cases - Wade-Stovell-Gilbert at 388 U.S. and their progeny teach that if courtroom identifications are material to conviction, there ought to be an exploration of pre-trial methods utilized by the prosecution which conceivably could be characterized as impermissibly suggestive. The expression by defense

counsel of the equal reliability of identifications made by law enforcement officials as compared with private citizens was too chartiable. This Court recently wrote:

> The certainty of identification is far less persuasive when the expressions come from the lips of an undercover agent . . . than when they are the words of an ordinary citizen, whether a bystander or a victim. The in-court identification has little meaning; The (defendant) was at the counsel table and (the officer) must have made dozens of identifications in the eight months between the narcotics sale and the trial. Perhaps the strongest bit of evidence to strengthen the identification (would have been an arrest at the time of occurrence)....
>
> * * *
>
> . . . the long and unexplained delay in arrest is troubling (in this case just two months)
>
> Brathwaite v. Manson - 527 F.2d 363 (2d Cir. 1975)

In the case at bar, the alleged criminal transactions took place in August 1974. The matter was presented to the Grand Jury in April 1975. The defendant, though always in his community, was not arrested until late October, 1975 - some 14 months after the alleged occurrences.

A remand is in order.

CONCLUSION

The judgment below should be reversed, or in the alternative a remand ordered.

RESPECTFULLY SUBMITTED,

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